In the Supreme Court of the United States

CLEM LOCKERTY, ANTHONY CARUSO, EDWARD A. CARROLL, LEO OSHINSKI, AND ENKAY PACKING COMPANY, INC., APPELLANTS

v.

CHARLES M. PHILLIPS, UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW JERSEY, APPELLEE

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT OPPOSING JURISDICTION AND MOTION TO AFFIRM [1]

STATEMENT OF THE CASE

This suit was brought by appellants to enjoin the appellee from prosecuting indictments charging violations of the Emergency Price Control Act of 1942 to which they, as defendants, had interposed demurrers and motions to quash, on the ground that the Act and regulation issued under it establishing wholesale meat prices were unconsti-

[1] At the request of the Clerk of the Supreme Court, the appellee is filing this statement with this Court at this time instead of filing it with the Clerk of the Court below.

tutional. Appellee filed a motion to dismiss the complaint for want of jurisdiction on the grounds (1) that Section 204 (d) of the Emergency Price Control Act withdrew jurisdiction from all courts to enjoin enforcement of the Act, and (2) that *Cline* v. *Frank Dairy Co.*, 274 U. S. 445, conclusively established that no equitable power exists in any court to grant a stay of pending criminal proceedings upon the ground that the statute on which they were rested was unconstitutional, because the defendants had an adequate remedy at law in the pending criminal cases, insofar as their right to attack the validity of the statute was concerned.

At the argument it was also pointed out to the court below that the claims as to unconstitutionality of the Price Control Act, which the plaintiffs in the equity suit were there asserting, did not even reach certain counts contained in many of the pending indictments charging them with violations of the record-keeping provisions contained in Section 202 of the Act, (50 U. S. C. App. Sec. 922). As this section was severable from the provisions attacked in the equity case as unconstitutional, the counts based thereon were not affected by the alleged unconstitutionality of those provisions in any event (*Kay* v. *United States*, 303 U. S. 1, 8). Counsel for appellee also conceded in the argument that all questions as to the validity of the Price Control Act were

open to the apellants as defendants in the criminal cases in accordance with the settled policy pursued by the United States in its enforcement of that statute in all of the criminal cases which have arisen since its enactment.

The court below granted the motion to dismiss for want of jurisdiction without hearing argument on the appellants' motion for injunction, upon the ground that Section 204 (d) withdrew jurisdiction to grant the relief sought. In so doing, it rejected the appellants' claim that this section was unconstitutional.

Section 204 (d) of the Emergency Price Control Act of 1942 reads as follows:

> Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall

> have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

In dismissing the complaint for want of jurisdiction, the lower court construed the last sentence of this section as not preventing the appellants from challenging the validity of the Act, as distinguished from the validity of the regulations issued under it, in any enforcement proceeding brought by the United States or by the Administrator, which is the settled construction which has been adopted by the Administrator and the United States in the civil and criminal enforcement of the Act, ever since its inception.[2]

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[2] Every federal court which has so far had occasion to pass upon the validity of Section 204 (d) has sustained it. *Hatter* v. *Henderson*, Civil Action No. 306, S. D. Ala., So. Div.

The provision withdrawing jurisdiction to stay, restrain, enjoin, or set side any provision of the Act was construed as applying only to suits in which affirmative relief was sought against enforcement, such as the complaint in this case. The lower court thus did not reach the contention with respect to the lack of any equitable power to restrain the prosecution of the pending criminal cases in any event or the more narrow question raised by the failure of the complaint to attack the validity of the provisions of the Act upon which many of the counts in the pending indictments were grounded.

THE APPEAL PRESENTS NO SUBSTANTIAL CONSTITUTIONAL QUESTION

The validity of the substantive provisions of the Emergency Price Control Act and the applicable regulations thereunder, which appellants seek to raise in this proceeding, is not squarely in issue. Those questions may be raised in the pending criminal action in which appellants are defendants, except to the extent that certain questions are reserved by Section 204 (d) of the Act for administrative determination and review in the emergency court of appeals. To the extent that appellants may seek to challenge the validity of this allocation of functions under Section 204

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unreported, decided July 28, 1942; *Henderson* v. *Kimmel*, 47 F. Supp. 635 (D. Kan. 1942); *Dieffenbaugh* v. *Cook*, 47 F. Supp. 645 (N. D. Ind., 1942).

(d), the challenge may properly be presented in the criminal action.[3] Indeed, in several criminal cases brought under the Act a similar contention has been made and passed upon; and it may be observed that the validity of the jurisdictional provision has been sustained (*United States* v. *Thomas Stores Inc.*, No. 7432, D. Minn., per Nordbye J., found in Pike and Fischer, Administrative Law, Sec. 85b.21–4; *United States* v. *Slobodkin*, No. 16058, D. Mass., per Wyzanski J., *idem*, Sec. 85b.21–1). Moreover, these rulings can, of course, be reviewed in the ordinary course of appellate procedure.

In the present case the validity of Section 204 (d) is presented in very narrow compass. The section provides that no court shall have jurisdiction to enjoin the enforcement of any provision of the Act or regulations thereunder. In its present application this provision simply confirms and generalizes sound equity practice. Federal courts will not enjoin the progress of criminal proceedings pending in either state or federal courts. (See *In re Sawyer*, 124 U. S. 200; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 451–452; *Beal* v. *Missouri Pacific R. Co.*, 312 U. S. 45, 49; *Campbell* v. *Medalie*, 5 F. Supp. 156 (S. D. N. Y.).) The rule is par-

[3] We agree with the construction by Judge Maris that the validity of the statute itself may be questioned in the district courts, while the validity of regulations may be questioned only in the emergency court of appeals, which also has power to consider the validity of the Act.

ticularly appropriate where the very issues which the bill in equity seeks to raise are in issue in the criminal case. We submit, furthermore, that there is no present occasion to consider the effect of threats of multiple prosecutions; the possibility thereof, as asserted in the bill of complaint, is too remote to warrant injunctive relief (Cf. *Watson* v. *Buck*, 313 U. S. 387, 400).

It is thus unnecessary, it is submitted, to consider the extent to which in other circumstances Congress may withdraw from the lower federal courts the power to issue injunctive or restraining orders. It may be observed, however, that in a number of cases this Court has recognized this power in a variety of circumstances (*Lauf* v. *E. G. Shinner & Co.*, 303 U. S. 323 (1938); *Myers* v. *Bethlehem Corp.*, 303 U. S. 41 (1938); *Smallwood* v. *Gallardo*, 275 U. S. 56 (1927); *Kline* v. *Burke Constr. Co.*, 260 U. S. 226 (1922).

Finally, we wish to point out that the complaint alleges "that many of the indictments" include a count or counts charging the appellants with wilfully failing to make and preserve complete and accurate records of the sales made by them. We do not understand that appellants challenge the validity of these requirements by themselves. This feature of the bill of complaint serves to emphasize the impropriety of attempting in a court of equity to control the prosecution of a criminal case involving several provisions of the Act which

may be deemed separable by the court in which the criminal case is being tried.

Accordingly, we submit that the appeal should be dismissed for the want of a substantial constitutional question or that the judgment of the court below be affirmed without argument.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

APR. 17, 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943